Supreme Court, U.S.
FILED
JUN 18 1991
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No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

JOINT APPENDIX

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Petition For Writ Of Certiorari Docketed
February 4, 1991; Petition Granted April 15, 1991

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CLOSED

U.S. District Court
Western District of Texas (Waco)

CIVIL DOCKET FOR CASE #: 89-CV-168

Collins v. City of Harker Hts.
Assigned to: Judge Walter S. Smith
Demand: $0,000
Lead Docket: None
Dkt # : is none
Dkt# in USCA is 89-8029

Cause: 42:1983 Civil Rights Act

Filed: 6/14/89
Jury demand: Plaintiff
Nature of Suit: 440
Jurisdiction: Federal Question

MYRA JO COLLINS plaintiff	Donald Lee Busby [COR LD NTC] Busby & Associates, P.C. 2109 Bird Creek Terrace Temple, TX 76502 (817) 778-4855
v.	
THE CITY OF HARKER HEIGHTS, TEXAS defendant	Roy Lee Barrett [COR LD NTC] Naman, Howell, Smith Et Al P.O. Box 1470 Waco, TX 76703-1470 817/754-1421
	Stuart G. Smith [COR LD NTC] Naman, Howell, Smith & Lee P.O. Box 1470 Waco, TX 76703

Docket as of May 6, 1991 9:38 am

Proceedings include all events. 6:89cv168 Collins v. City of Harker Hts.

6/14/89	1	Complaint filed and 1 summons(es) issued (bh) [Entry date 06/19/89]
6/22/89	2	Return of service executed as to City of Harker Hts. 6/20/89 (bh)
7/7/89	3	Motion by City of Harker Hts. To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted (bh)
7/7/89	4	Brief by City of Harker Hts. in support of Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
8/24/89	5	Response by Myra Jo Collins To Defendant's Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
8/31/89	6	Reply by City of Harker Hts. To Response To Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
10/30/89	7	Order Granting Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
10/31/89	8	Judgment: Defendant's motion to dismiss is granted (bh)
10/31/89	–	Case dismissed (bh)
10/31/89	9	Supplemental Brief by Myra Jo Collins in Opposition To Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
11/16/89	10	Notice of appeal by Myra Jo Collins (csw) [Entry date 11/17/89]
11/16/89	11	Certificate that No Transcript is to be Ordered. (csw) [Entry date 11/17/89]

11/16/89	12	Motion by Myra Jo Collins to Waive Requirement of Cost Bond on Appeal (csw) [Entry date 11/17/89]
11/17/89	–	Notice of appeal and certified copy of docket to USCA: appeal [10-1] (csw)
11/21/89	13	Order Denying as Moot Motion To Waive Requirement of Cost Bond on Appeal [12-1] (csw) [Entry date 11/22/89]
11/24/89	–	Return of appeal information sheet received. appeal [10-1] USCA NUMBER: 89-8029 (csw)
11/24/89	–	Certified and transmitted record on appeal to U.S. Court of Appeals: appeal [10-1] (csw)
12/4/89	–	Return of appeal information sheet received. appeal [10-1] USCA NUMBER: 89-8029 (csw) [Entry date 12/06/89]
11/28/90	14	Certified copy of judgment of USCA affirming appeal [10-1] (pr)
12/10/90	–	Record on Appeal returned from Fifth Circuit (pr)
4/25/91	–	Certified and transmitted record to the United States Supreme Court per written instructions from Fifth Circuit. Supreme Court case number 90-1279. Writ of Certiorari granted. (pr)
4/26/91	15	Order that the Clerk include a "copy" of the file-marked Certificate That No Transcript Is To Be Ordered with the original record being sent to the Supreme Court. (pr) [Entry date 04/29/91]

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS
WACO DIVISION

MYRA JO COLLINS	X	CIVIL ACTION
	X	NO W 89CA168
VS.	X	
	X	JURY TRIAL
THE CITY OF HARKER	X	DEMANDED
HEIGHTS, TEXAS	X	

ORIGINAL COMPLAINT

The Plaintiff MYRA JO COLLINS files this her Original Complaint against THE CITY OF HARKER HEIGHTS, TEXAS.

Nature of Action, Jurisdiction and Venue

1. This is an action instituted under the Constitution and Laws of the United States of America, more particularly, the Fifth and Fourteenth Amendments to the United States Constitution and the Reconstruction Era Civil Rights Act as codified in 42 U.S.C. 1983, 1985(2) and 1988.

Plaintiff also asserts claims under Article I Sec. 19 of the Constitution of the State of Texas and the common law thereof.

The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1331 and 1343.

The venue of this cause of action lies in Bell County, Texas, pursuant to the death of Larry Michael Collins, the deceased husband of Plaintiff, his death being the subject matter of this lawsuit, having occurred in Bell County, Texas.

Right to Sue in Federal Court

The cause of action arises out of the Federal Law 42 U.S.C. 1983 and, therefore, the cause of action may proceed in Federal Court.

Defendant

Defendant, THE CITY OF HARKER HEIGHTS, TEXAS, is a Texas Municipal Corporation, located in Bell County, Texas and service may be obtained by serving a summons on the City Manager, Hal Weiler, at 901 South Ann, Harker Heights, Texas.

Federal Cause of Action 42 U.S.C. 1983

1. Larry Michael Collins was an employee for the City of Harker Heights, Texas in their Sanitation & Sewer Department.

2. The City of Harker Heights is a Home Rule City and is a Texas Municipal Corporation.

3. Larry Michael Collins began working for the City of Harker Heights about July 1, 1988.

4. Part of the job responsibilities of Larry Michael Collins was to enter sewer mains through manholes when there was a sewer line problem.

5. The City of Harker Heights provided no safety training to Larry Michael Collins but required him to work in sewer lines as a part of his job.

6. There were no safety warnings or signs posted to inform Larry Michael Collins of the danger of entering a sewer line.

7. There were no instructions, literature or signs concerning how one should protect themselves before entering sewer lines and other confined spaces.

8. The City of Harker Heights owned air blowers and safety ropes, but the supervisors were not instructed or required to use them, therefore, whey [sic] were rarely used, nor were the employees instructed on how or why to use them.

9. No gas detector meters were available at the City of Harker Heights for employees entering sewer lines.

10. The City of Harker Heights through its supervisors were aware of the dangers of gases accumulating in sewer lines and were aware of the dangers of such gases.

11. On October 21, 1988, Larry Michael Collins entered a manhole in the City of Harker Heights to try and unstop a sewer line.

12. Larry Michael Collins entered the manhole (approximately 18 feet in depth) without any safety equipment, without a harness, respirator, air blower, or gas detector meter.

13. Upon entering the manhole Larry Michael Collins passed out and before he could be removed, died of asphyxia due to suffocation (oxygen deprivation).

14. Effective January 1, 1986, the State of Texas implemented a law entitled "Hazard Communication Act", the purpose of which was stated in part as follows:

> "It is also the intent and purpose of this Act that the information be provided to employees who may be exposed to hazardous chemicals in nonmanufacturing workplaces . . . "

15. The Act further defines "employee" as follows:

> "The term 'employee' includes persons working for the State of Texas and its political subdivisions, . . . "

16. "Nonmanufacturing" employer means "The State of Texas and its political subdivisions".

17. The Hazardous Communication Act requires "Employers *shall* post adequate notice, at locations where notices are normally posted, informing employees about their rights under this Act".

18. The Act further requires the employer to provide training to new or newly assigned employees before working with or in a work area containing hazardous chemicals.

19. Furthermore, the Act provides:

> " . . . employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act."

Constitutional Violations

1. Prior to October, 1988, the custom, policy and procedure of the City of Harker Heights, Texas was not to train new employees of the dangers of working in sewer lines and manholes. Furthermore, there was a custom to not take any safety equipment to the job site when a manhole or sewer line was to be entered, or if some was taken, it was not used.

2. Prior to October, 1988, the City of Harker Heights was on notice of the dangers to which the employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before Larry Michael Collins began work at the City of Harker Heights.

Furthermore, the Hazardous Communication Act became effective January, 1986, which imposed a burden on the City of Harker Heights to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use.

3. There was a custom and policy to not post any type of safety warnings or signs concerning the dangers of entering sewer lines and the dangers of not utilizing their safety equipment.

4. Larry Michael Collins had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.

5. The need for the training of these employees and the acquisition and use of safety equipment is so obvious, especially in light of the Texas Hazardous Communication Act and by such it was so obvious that such a custom and policy resulted in such an inadequacy that it would result in the violation of an employee's constitutional rights – the right to be free from harm and injury resulting in death.

State Constitutional Rights

Plaintiff would show the Court that not only were the Federal Constitutional rights of Larry Michael Collins violated, but his State Constitutional rights were violated as well. Article 1, Section 19 of the Texas Constitution states as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land".

Casual Connection

The City of Harker Heights' policy and procedure not to train newly hired personnel in the sewer department before they were placed in underground sewer lines and manholes, their policy and procedure to not train employees in the use of proper safety equipment required by the State law and policy and custom not to require the safety equipment to be on hand or used at the job site were all the cause of the death and deprivation of the constitutional rights of Larry Michael Collins.

Claim for Relief

1. Actual damages for loss of wages;
2. Mental anguish of Larry Michael Collins;
3. Termination of the love, comfort, companionship and society;
4. Loss of care, maintenance, support, services, advice and counsel;
5. Mental anguish of Plaintiff and funeral and burial expenses;
6. All of the above damages exceed One Million and No/100 Dollars ($1,000,000.00).

Prayer

Upon the foregoing premises, Plaintiff prays that Defendant be served with process and upon final hearing be required to pay to Plaintiff her damages in an amount that the

evidence may show and the jury may find and such other relief as the Court shall deem the Plaintiff has shown herself entitled.

Respectfully submitted,

Busby & Associates, P.C.
2109 Bird Creek Terrace
Temple, Texas 76502
(817)-778-4855

By: /s/ Don Busby
DON BUSBY
State Bar #03490000

ATTORNEYS FOR PLAINTIFF

JURY TRIAL DEMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	
V.	)	CIVIL ACTION NO. W-89-CA-168
THE CITY OF HARKER HEIGHTS, TEXAS	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE WALTER S. SMITH, JR.:

The City of Harker Heights, Texas ("defendant") files this its Motion To Dismiss Plaintiff's Original Complaint For Failure to State a Claim Upon Which Relief Can Be Granted and would show unto the Court as follows:

1.

As further set forth in the Brief accompanying this Motion, defendant moves the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the action because the Complaint fails to state a claim against defendant upon which relief can be granted.

Attached to this Motion is the affidavit of Michael Bratcher in support of the Motion.

WHEREFORE, defendant The City of Harker Heights, Texas prays that the court dismiss Plaintiff's Original Complaint for failure to state a claim upon which relief can be

granted and for such other and further relief as to which defendant may justly be entitled.

Respectfully submitted,

/s/ Stuart Smith
Roy L. Barrett
State Bar No. 01814000
Stuart Smith
State Bar No. 18685885
of
NAMAN, HOWELL, SMITH
& LEE, P.C.
Texas Center
P.O. Box 1470
Waco, Texas 76703-1470
817/754-1421

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendant's Motion To Dismiss Plaintiff's Original Complaint For Failure To State a Claim Upon which Relief May Be Granted was mailed by certified mail, return receipt requested, to plaintiff's attorney of record, Don Busby, Busby & Associates, P. C., 2109 Bird Creek Terrace, Temple, Texas 76502 on this 7th day of July, 1989.

/s/ Stuart Smith
Stuart Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	
V.	)	CIVIL ACTION NO. W-89-CA-168
THE CITY OF HARKER HEIGHTS, TEXAS	)	

AFFIDAVIT

ON THIS DAY before me, the undersigned, personally appeared Michael Bratcher, known to me to be the person whose name is subscribed hereto and under oath stated as follows, and, being duly sworn by me, stated on his oath as follows:

"My name is Michael Bratcher. I am over the age of 18 years, have never been convicted of a felony, and am of sound mind. I have personal knowledge of every statement made herein, and I am fully competent to testify as to the matters stated herein.

"I am a Claims Supervisor for GAB Business Services. "[sic] GAB Business Services is the servicing contractor for the Texas Municipal League Joint Workers' Compensation Self-Insurance Fund.

"On October 21, 1988, pursuant to Article 8309h, Texas Revised Civil Statutes, the City of Harker Heights, Texas was a participant in and a member of the Texas Municipal League Joint Workers' Compensation Self-Insurance Fund.

"Myra Jo Collins, the wife of Larry Michael Collins, made a claim for workers' compensation benefits for the injuries and death of her husband on October 21, 1988. The claim was assigned Industrial Accident Board File No. 89012396C2.

"Myra Jo Collins is currently receiving workers' compensation benefits from the Texas

Municipal League Joint Workers' Compensation Self-Insurance Fund."

/s/ Michael Bratcher
Michael Bratcher

STATE OF TEXAS	)
COUNTY OF TRAVIS	)
	)

BEFORE ME, the undersigned authority, on this day personally appeared Michael Bratcher, known to me to be a credible person, who, being duly sworn stated on his oath that he has read the foregoing Affidavit and that all facts contained therein are true and correct to his own personal knowledge.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 6th day of July, 1989.

/s/ Cynthia L. Ortiz
Notary Public in and for
the State of Texas

CYNTHIA L. ORTIZ
Printed Name of Notary

My commission expires: 2/2/93

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	
V.	)	CIVIL ACTION NO. W-89-CA-168
THE CITY OF HARKER HEIGHTS, TEXAS	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE WALTER S. SMITH, JR.:

The City of Harker Heights, Texas ("defendant") submits this Brief In Support Of Motion To Dismiss Plaintiff's Complaint For Failure To State A Claim Upon Which Relief Can Be Granted and would show unto the Court as follows:

1.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Myra Jo Collins ("plaintiff") is the widow of Larry Michael Collins, a former employee of defendant. Larry Michael Collins died on October 21, 1988, while in the course and scope of his employment as an employee of defendant. Defendant is a participant in a workers' compensation self-insurance plan which is the statutory equivalent of having workers' compensation insurance coverage. *See* TEX. REV. CIV. STAT. ANN. art. 8309h (Vernon Supp. 1989). Plaintiff filed for and is receiving benefits from the self-insurance plan.

On June 14, 1989, plaintiff, pursuant to 42 U.S.C. §1983, filed this suit against defendant alleging that defendant violated her husband's federal constitutional rights under the Fifth and Fourteenth Amendments. Plaintiff also alleged violations of the Constitution of the State of Texas. Defendant was served on June 20, 1989. Plaintiff prayed for damages

which are claimed to exceed one million dollars. Contemporaneously with this Brief, defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

2.

ARGUMENT AND AUTHORITIES

Based on the facts alleged by plaintiff, there is no legal theory on which plaintiff may hold defendant liable. Plaintiff, evidently realizing that workers' compensation immunity protects defendant from negligence and wrongful death claims and that the Texas Tort Claims Act protects defendant from exemplary damages claims, has attempted to convert her negligence and wrongful death claims into federal and state constitutional claims. While plaintiff's attempt to evade the clear intent of the workers' compensation laws and Texas Tort Claims Act is admittedly creative, the case law establishes that her attempt must nevertheless fail.

A.

Workers' Compensation Immunity

The workers' compensation laws provide absolute immunity from any negligence or wrongful death claims which plaintiff might bring. Section 101.028 of the Texas Civil Practice & Remedies Code provides as follows:

> A governmental unit that has workers' compensation insurance or that accepts the workers' compensation laws of this state is entitled to the privileges and immunities granted by the workers' compensation laws of this state to private individuals and corporations.

It is undisputed that defendant has accepted the workers' compensation laws of Texas and that plaintiff has elected to receive workers' compensation benefits. Defendant is therefore entitled to the immunities granted by the Texas workers' compensation laws. The workers' compensation laws prohibit

actions against an employer for damages resulting from the employee's death based on negligence.

> [T]he representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employees for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for.

TEX. REV. CIV. STAT. ANN. art. 8306 §3(a) (Vernon Supp. 1988). Defendant has workers' compensation immunity from any negligence or wrongful death claim which plaintiff could assert.

B.

Immunity From Exemplary Damages

The Texas Tort Claims Act provides absolute immunity from any exemplary damages claim which the plaintiff might bring. Article 8306 §5 of the workers' compensation laws would ordinarily permit a deceased worker's survivors to bring an exemplary damages claim against his employer for gross negligence.

> Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employe [sic] whose death is occasioned by homicide from the wilfil [sic] act or omission or gross negligence of any person, firm or corporation from the employer of such employe [sic] at the time of the injury causing the death of the latter.

TEX. REV. CIV. STAT. ANN. art. 8306 §5 (Vernon 1967). However, the Tort Claims Act prohibits claims against governmental entities such as the City of Harker Heights for exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. §101.024 (Vernon 1986); *see also Duhart v. State*, 610 S.W.2d 740 (Tex. 1980) (there is no waiver of governmental immunity in a suit brought by survivors of deceased state employee

against the state for exemplary damages under allegation that state's gross negligence caused employee's death).

C.

No Constitutional Violation is Stated

Obviously realizing that she cannot bring ordinary or gross negligence claims against defendant, plaintiff has attempted to characterize her tort claim as a constitutional claim against defendant. Plaintiff's attempt, however, is directly contrary to established case law. The courts have repeatedly held that an employee or his representative may not turn an ordinary negligence or wrongful death claim into a constitutional claim simply because the employee happens to work for a governmental entity. A case directly on point is *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986). In *McClary*, the plaintiff's deceased husband worked for the county highway department. While in the course of his employment, the plaintiff's husband was struck by the boom of a crane and died. The plaintiff brought suit against the county, among others, under 42 U.S.C. §1983. The plaintiff alleged that the county violated state safety laws by failing to properly inspect and maintain the crane and by allowing the crane operator to operate the crane without a required certificate of competency. The plaintiff further alleged that the conduct of the defendants was reckless and that the county had an established policy of disobeying state and federal safety regulations.

The district court dismissed the plaintiff's complaint for failure to state a claim and the court of appeals affirmed. In affirming the dismissal, the court of appeals noted that "the only fact distinguishing this case from an ordinary tort action brought by an employee against an employer is the identity of that employer" and that the constitution "does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." 786 F.2d at 89. The facts of *McClary* are strikingly similar to the present case and the reasoning is

directly applicable. This Court should therefore dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted.

In at least two other cases, both involving prison guards attacked by inmates, the federal courts of appeals have held that there is no constitutional right to a safe work place. *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994, 107 S. Ct. 597, 93 L.Ed.2d 597 (1986). In *Walker* the appellate court assumed for the purposes of its decision that the defendants were grossly negligent and that they knew that their acts and omissions increased the risk of injury to the plaintiffs. The court then held that "[t]he constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment" and that "the due process clause does not assure safe working conditions for public employees." *Walker*, 791 F.2d at 507.

The Court in *Washington* affirmed the district court's dismissal of plaintiff's complaint for failure to state a claim. The plaintiff had alleged that the defendants were grossly negligent and reckless and that they were in violation of a court order to correct unsafe conditions at the prison. The court rejected the plaintiff's attempt to federalize his state tort law claims and held that the plaintiff has no constitutional right to a safe working environment.

The same reasoning applicable to plaintiff's federal constitutional claims should also be applied to dismiss plaintiff's state constitutional claims. Although there appears to be no case law holding that the state constitution does not permit workers to turn ordinary tort claims into constitutional claims, there is likewise no case law for the proposition that such a transformation is permitted. The Texas courts have held that article I, §19 of the Texas constitution protects the same substantive due process rights as does the federal Constitution. *See* Interpretative Commentary to TEX. CONST. art. I, §19. As there is no federal constitutional right to a safe working environment, there is likewise no state constitutional right to a safe working environment. To create such a cause of

action would allow governmental employees to have greater rights than do employees of private employers. Plaintiff's state constitutional claims should be analyzed and treated in the same manner as her federal constitutional claims.

Based on the case law discussed above, this Court should dismiss plaintiff's federal constitutional claims.

Respectfully submitted,

/s/ Stuart Smith
Roy L. Barrett
State Bar No. 01814000
Stuart Smith
State Bar No. 18685885
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	X	CIVIL ACTION NO.
VS.	X	W-89-CA-168
	X	FILED
THE CITY OF HARKER HEIGHTS, TEXAS	X	AUG 24 1989
	X	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Plaintiff, MYRA JO COLLINS, and submits this response to the Defendant's Motion To Dismiss Plaintiff's Complaint, and would respectively show unto the Court as follows:

1. In its Motion To Dismiss, THE CITY OF HARKER HEIGHTS, TEXAS (hereinafter sometimes "HEIGHTS") has alleged that Mrs. Collins failed to state a cause of action on which relief can be granted. For purposes of evaluating the Motion filed by HEIGHTS, this Court is required to assume the facts pleaded by Mrs. Collins in her original complaint are true and correct. Only if no relief can be provided to Mrs. Collins based on the allegations contained in her complaint can this Court dismiss her complaint.

HEIGHTS was aware, prior to the time Larry Michael Collins began working for HEIGHTS, of the dangers which faced its workers who entered a sewer line. HEIGHTS was aware that workers entering an unventilated sewer line could be rendered unconsciousness [sic] and killed. HEIGHTS was aware of this potential deadly danger because Larry Collins' supervisor had, a few months before Larry Collins' death, been rendered unconscious when entering an unventilated sewer line. The fact that HEIGHTS knew of these potential deadly dangers is underscored by the fact that HEIGHTS had

purchased air blowers and safety ropes for use in sewer lines. Furthermore, HEIGHTS was aware of the "Hazard Communication Act", passed in January 1, 1986, which specifically required municipalities to train employees concerning the hazards of chemicals found in sewer lines, the measures those employees could take to protect themselves from the hazards of those chemicals and to provide the employees with appropriate protective equipment.

Despite the prior experience of Larry Collins' supervisor, the passage of the Hazard Communication Act and the need for air blowers and safety ropes, HEIGHTS refused to provide safety training, safety warnings or gas detector meters to its employees who would, on a daily basis, face the deadly danger of going in to sewer lines. HEIGHTS also refused to train or instruct its employees in the use of air blowers and safety ropes, or to make sure that those air blowers and safety ropes were available when an employee or employees entered sewer lines to work.

On October 21, 1988, less than four months after he began working for HEIGHTS, Larry Collins was ordered to enter a manhole to try to unstop a sewer line. Within minutes, Larry Collins passed out and died of asphyxia due to suffocation.

Larry Collins died because HEIGHTS followed a policy of not providing safety equipment to its personnel, not training its personnel to recognize the hazards of entering a sewer line and not warning its employees of those hazards. HEIGHTS followed this policy of placing its employees in a deadly situation despite the fact that Larry Collins' supervisor had, only a few months before Larry Collins' death, passed out and nearly died in a sewer line under virtually the same conditions that killed Larry Collins.

2. *Most of HEIGHTS' Brief in support of its Motion To Dismiss is irrelevant.* In the first three and one-half pages of its Brief, HEIGHTS discusses the Texas Workers' Compensation Statute and that statute's effect on the Texas Tort Claims Act. That statute has absolutely nothing to do with the claim stated in the Plaintiff's original complaint. The Supreme Court of the United States has made it clear that governmental

conduct which is wrongful under 42 USC Section 1983, et sec [sic], cannot be immunized by state law. *Martinez v. California*, 444 U.S. 277, 284 (at note 8), 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980). The cause of action set forth in Mrs. Collins original complaint is based on Section 1983, and survives regardless of the Texas Workers' Compensation Statute.

In pages 4 - 5 ½ of its Brief, HEIGHTS talked about three cases in which Courts of Appeal have held that there is no constitutional right to a safe work place. *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986), *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) and *Walker v. Rowe*, 791 F.2nd 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986). The constitutional right of which Larry Collins was deprived was the constitutional right of life, *not* the right to a safe work place. He was deprived of that constitutional right by a policy or custom of HEIGHTS to fail to train its employees in the use of safety equipment and its failure to warn its employees of the deadly dangers associated with going in to unventilated sewer lines. Furthermore, the *Washington* and *Walker* cases dealt with injuries caused to governmental employees by private citizens. In the *McClary* case, the Court went out of its way to point out that the injury to the plaintiff " . . ." however tragic, was an accident neither the occurrence of which nor the victim of which could have been predicted . . . ". *McClary* at 87. In the case at bar, Mr. Collins' death could have been predicted because of the prior experience of Mr. Collins' supervisor; furthermore, his death would have been avoided by HEIGHTS properly training and warning its employees and providing them with the requisite safety equipment all in compliance with the procedure envisioned by applicable law (the Hazard Communication Act).

It is also of importance to note that *McClary*, *Washington* and *Walker* were all decided prior to the Supreme Court decision in *City of Canton, Ohio v. Harris, et al* 109 S.Ct. 1197, (1989). In *Harris*, the United States Supreme Court specifically held that a municipality can be held liable under 42 U.S.C. Sec. 1983 for injuries which result from the failure of the city to train its employees.

3. *HEIGHTS failure to train its employees makes it liable for Larry Collins' death.* In a recent decision, the United States Supreme Court has specifically held that a municipality can " . . . be liable under 42 U.S.C. Sec. 1983 for constitutional violations resulting from its failure to train *municipal employees*." *City of Canton, Ohio v. Harris* (emphasis added), 109 S.Ct. 1197, 1200 (1989). In reaching this holding, the *Harris* Court made the following statement:

> Where a Sec. 1983 plaintiff can establish that the facts available to the city policy makers put them [sic] actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. *Harris*, supra, at 1208.

When these facts are established, the Court noted that it could be said that " . . . the municipality has made a deliberate choice to follow a course of action from among various alternatives." *Harris*, supra, at 1208.

In the case at bar, Larry Collins' supervisor had been rendered unconscious when he went into an unventilated sewer line only months before Larry Collins was killed. This near tragedy, months prior to Larry Collins' death, was a fact which would put the city policy makers on actual or constructive notice that the failure to train their employees and the failure to warn those employees concerning the dangers of going into a sewer line, together with the failure to train those employees in how to use the necessary safety equipment, was substantially certain to result in death. Thus, the dictates of *Monell* are satisfied by the facts of the case at bar, as recently confirmed by the holding in *Harris*, Supra.

The *Harris* Court has followed a path of reasoning which is consistent with the Fifth Circuit as announced in the case of *Languirand vs. Hayden*, 717 F.2d 220 (5th Cir. 1983), cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 353 (1984). In *Hayden*, the Fifth Circuit said that a municipality would be liable for injuries resulting from its failure to train when there was evidence of a pattern of similar incidents where people were injured or endangered by the failure to

train, or where there was serious incompetence or misbehavior that was general or wide spread. It would certainly seem that one previous near death resulting from an employee going into an unventilated sewer line would certainly provide evidence of the similar incident of injury or endangerment that is envisioned by *Hayden*.

There can be no doubt that the failure of HEIGHTS to train its employees, to warn them concerning the use of safety equipment and to properly provide them with safety equipment was the proximate cause of Larry Collins' death. With that training, warning and provision of equipment, Larry Collins' would either not have ventured in to the sewer line or the sewer line would have been properly ventilated. Furthermore, with proper retrieval equipment, Larry Collins' [sic] could have been removed from the sewer line even if he had gone into it and been overcome by noxious gases. Thus, the causal connection between HEIGHTS' policy and Larry Collins' death is established. See *Pembaur v. Cincinnati* 475 U.S. 469, 483-484, 106 S.Ct. 1292, 300, 89 L.Ed.2d 452 (1986).

WHEREFORE, PREMISES CONSIDERED, MYRA JO COLLINS respectfully request that this Court deny, in all things, the Motion To Dismiss now filed by The City of Harker Heights, Texas; and for such other and further relief to which she might show herself entitled.

Respectfully submitted,

BUSBY & ASSOCIATES, P. C.
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(817) 778-4855

BY: /s/ Don Busby
DON BUSBY
State Bar #03490000

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	CIVIL ACTION
	)	NO. W-89-CA-168
V.	)	
	)	FILED
THE CITY OF HARKER HEIGHTS, TEXAS	)	AUG 31 1989
	)	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE WALTER S. SMITH, JR.:

The City of Harker Heights, Texas ("defendant") submits this Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Original Complaint for Failure to State a Claim Upon Which Relief Can be Granted and would show unto the Court as follows:

1.

On June 14, 1989, plaintiff Myra Jo Collins ("plaintiff"), pursuant to 42 U.S.C. § 1983, filed this suit against defendant alleging that defendant violated her husband's federal and state constitutional rights. On July 7, 1989, defendant timely filed a Motion to Dismiss Plaintiff's Complaint For Failure to State a Claim Upon Which Relief Can Be Granted and a Brief in Support of the Motion. On August 23, 1989, plaintiff filed her Response to defendant's Motion to Dismiss. This Reply responds to several invalid legal arguments contained in plaintiff's Response.

2.

Plaintiff appears wholly unable to cite the Court to any cases which even begin to embody her theory of liability. Without any case law in her favor, plaintiff is limited to taking ineffectual swipes at the authority of defendant, which

is directly on point, and to making the claim that defendant's authority has somehow been disapproved by a recent Supreme Court opinion with no bearing on the case before the Court.

3.

Plaintiff attempts to belittle the three cases cited by defendant, *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994, 107 S. Ct. 597, 93 L.Ed.2d 597 (1986); *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); as concerning only a "constitutional right to a safe work place" rather than "constitutional right of life, not the right to a safe work place." Plaintiff's Response at 4. Plaintiff's assertion is incorrect. In *McClary*, the court specifically stated that: "[T]he heart of this case, is whether the complaint sufficiently alleges a deprivation of life without substantive due process." 786 F.2d at 88. The court went on to hold: "In sum, under these circumstances, the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." *Id.* at 89. Thus, the main distinction which plaintiff asserts exists between her case and the case directly on point does not exist.

Further, of the other two cases cited by defendant, one involved the death of the plaintiff's descendant [sic], *Walker*, 791 F.2d at 508, and the other involved serious injury to the plaintiff. *Washington*, 802 F.2d at 1479. Whether the issue is framed in terms of a constitutional right to a safe work place or a constitutional right to life and liberty, the result is the same – the constitution is not a code of occupational safety. *See Walker*, 791 F.2d at 508.

Plaintiff attempts to further distinguish her case on the basis that it involves training rather than a safe work place. Plaintiff ignores the fact that two of the above-cited cases dealt with training. In *Walker* the plaintiffs alleged that: "The guards did not receive enough training in controlling riots, and the existing training was poor." 791 F.2d at 509. In *McClary*, the plaintiff alleged that the crane operator did not

have a certificate of competency, thereby suggesting that the operator was inadequately trained. 786 F.2d at 84. Although the issue of allegedly inadequate training was raised in these two cases, the courts uniformly held that the plaintiffs did not have a constitutional claim. Plaintiff has not demonstrated any valid distinctions between her case and the three cases cited by defendant.

4.

Unable to provide a legitimate distinction between the cases on point and her own case, plaintiff suggests that the above-cited cases have somehow been disapproved by the recent Supreme Court case of *City of Canton, Ohio v. Harris*, 489 U.S. ___, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989). *Harris* adds nothing to the discussion of the issue raised in this case. *Harris* involves a plaintiff who, while in police custody, was allegedly denied adequate medical care due to a failure to properly train police officers. It has long been the law in the circuit courts that municipalities could be held liable for failure to train municipal employees in certain circumstances. These cases had been in existence long before the above-cited cases, and *Harris* only serves to confirm existing law. *Harris* does not, therefore, in any way serve to disapprove defendant's cases.

To the extent that *Harris* could be relevant, *Harris* is, of course, easily distinguishable from the present case because it involved the abuse of power by a state official. *McClary*, 786 F.2d at 89. Further, *Harris* involved a pretrial detainee, and it is well established that the protections available to those in the state's custody are far different from those available to those not in the state's custody. As the Seventh Circuit colorfully explained in *Walker*: "The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten." 791 F.2d at 511. In summary, *Harris* does not in any way affect the validity of the cases which establish that plaintiff has failed to state a constitutional claim.

5.

Plaintiff has not cited a single case in favor of her unique theory which would vastly increase tort claims, clothed as constitutional claims, against municipalities. Plaintiff has not even attempted to explain why employees of municipalities should be entitled to an entirely new theory of liability which is not available to private employees. On the other hand, defendant has cited three thoughtful and well-reasoned opinions from respected courts of appeals which amply point out the flaws with the new scheme of liability proposed by plaintiff. Defendant therefore requests that the Court dismiss plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 30 1989]

ORDER

On this day came on to be considered the Defendant's motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) in the above-styled and numbered cause. The Court, having considered the motion, is of the opinion that it is meritorious and should be granted.

Plaintiff is the widow of Larry Michael Collins, a former employee of the City of Harker Heights, Texas. Mr. Collins died on October 21, 1988 when he was asphyxiated by poisonous gases while working in a sewer line. Plaintiff brings suit under 42 U.S.C. § 1983, alleging that her husband's death resulted from the Defendant's violation of his federally protected constitutional rights. Plaintiff contends that Defendant's failure to train and warn its employees of the dangers associated with working in a sewer line represented a conscious indifference to her husband's constitutionally protected rights. Plaintiff further alleges that the conduct of Defendant establishes a policy or custom of placing its employees in deadly situations without proper safety precautions. Defendant has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted.

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum and Chemical Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be

dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

In order for a claim to exist pursuant to 42 U.S.C. § 1983 it is necessary that the Plaintiff be deprived of a federally protected right by a person acting under color of state law. A municipality can be held liable under § 1983 "when the execution of the government's policy or custom . . . inflicts the injury." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). It is not necessary that the government policy or custom be reduced to a written procedure. It is enough that the act which inflicts the injury be representative of official policy. *Id.* at 694.

The first question in any case alleging municipal liability under § 1983 is whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197, 1203 (1989). Only when a municipality's failure to train its employees evidences a "deliberate indifference" can such a shortcoming be considered a city "policy or custom" that is actionable under § 1983. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).

The degree of culpability required to find a violation of due process cognizable under § 1983 is something more than a negligent act. The Due Process Clause is simply not implicated by negligence or the mere lack of due care of an official causing unintended injury or loss of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328-329, 106 S.Ct. 662, 663 (1986). Failure to train employees can only serve as the basis for liability under § 1983 when it amounts to a deliberate indifference to the rights of pesons effected and when that failure to train is the moving force behind the constitutional violation. *City of Canton*, ___ U.S. ___, 109 S.Ct. at 1205.

In this case the Plaintiff has alleged that the Defendant acted with deliberate indifference. The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. (*See City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197 (1989); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).) In this case the deceased was not in the custody of the Defendant, he was an employee. The Second Circuit has held that even deliberate exposure of public employees to a "high risk" does not violate the constitution because it is not an abuse of governmental power. *McClary v. O'Hare*, 786 F.2d 83 at 88 (2nd Cir. 1986). Improper actions by an employer do not violate the employee's constitutional rights simply because the employer is a governmental official. *Id.* at 89. In this case the acts of the Defendant's superintendent as alleged by the Plaintiff do not amount to a deliberate indifference as to a constitutionally protected right, which is required to find the city liable under § 1983. Accordingly,

IT IS ORDERED that the Motion of Defendant City of Harker Heights to Dismiss is GRANTED.

SIGNED this 30th day of October, 1989.

WALTER S. SMITH, JR.

Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 31, 1989]

JUDGMENT

In accordance with the Order of this Court entered on this day granting Defendant's Motion to Dismiss, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is DISMISSED.

SIGNED this 31st day of October, 1989.

WALTER S. SMITH, JR.
Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	X	CIVIL ACTION
	X	NO. W 89-CA-168
VS.	X	
	X	FILED
THE CITY OF HARKER	X	OCT 31 1989
HEIGHTS, TEXAS	X	

PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO DISMISS

Plaintiff MYRA JO COLLINS submits the following supplemental brief in opposition to the motion to dismiss filed by Defendant CITY OF HARKER HEIGHTS, TEXAS ("The City").

INTRODUCTION

Plaintiff has brought this action under 42 U.S.C. Section 1983, alleging that The City's failure to train its employees in statutorily mandated work safety measures amounted to deliberate indifference to her husband Larry Michael Collins' ("Collins") substantive due process rights to life and liberty, and resulted in the deprivation of those constitutional rights. As thus pled, Plaintiff's Original Complaint states a cause of action under Section 1983, under the standard recently enunciated by the United States Supreme Court in *Canton v. Harris*, 489 U.S. ___, 103 L.Ed.2d 412 (1989). This Court can and should reject the authority cited by The City and be guided instead by *Harris*, which plainly recognizes a cause of action against municipalities for their failure to train employees, under the "deliberate indifference" standard. Moreover, in view of the state statutory guarantees provided by the Texas Hazard Communication Act, Plaintiff can and will establish The City's deprivation of Collins' rights as created by that law, giving rise to a section 1983 claim.

DISCUSSION

I. WALKER, WASHINGTON AND WALKER [sic] DO NOT MANDATE DISMISSAL OF PLAINTIFF'S SECTION 1983 CLAIM

Defendant relies exclusively on three cases, none of which is controlling, and all of which are distinguishable and wrongly decided – particularly in view of the Supreme Court's subsequent decision in *Harris*. In *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986), a prison guard who had been attacked by an inmate brought a Section 1983 action, alleging that the attack resulted from the "reckless" failure of the public officials involved to remedy unsafe prison conditions. The District of Columbia Circuit found "no cases" recognizing an employee's right to a safe work place, without authority, and concluded that merely "reckless" failure to train was insufficient to establish the deprivation of a Fourteenth Amendment liberty interest. The court noted that the appellant did not allege intentional conduct, but merely gross negligence and recklessness. (*Id.* at 1479.)

In *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986), as in *Washington*, prison guards sued state prison officials, to recover for injuries suffered at the hands of inmates. The Seventh Circuit also rejected the notion of an employee's right to a safe work place, and concluded that "gross negligence" allegations were insufficient to state a cause of action under Section 1983.

Finally, in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), the Second Circuit held that a county employee killed in an accident involving a crane operated by a fellow employee who allegedly had not adequately been trained could not state a cause of action under Section 1983 for the county's failure to provide a safe work place.[1]

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[1] Plaintiff in *McClary* asserted claims of equal protection and procedural due process, as well as substantive due process. Neither equal protection nor procedural due process claims are raised here.

None of these decisions bars Plaintiff's claim here. First, as decisions of other circuits, they are not binding on this Court.

Second, these three cases are all factually distinguishable. In *Walker* and *Washington* only negligence or recklessness were alleged, whereas Plaintiff's claim here is based on the higher standard of "deliberate indifference."[2] Moreover, the immediate cause of the plaintiffs' injuries in those cases was the conduct of the third parties – the inmates – rather than of public employees or officials. Here, Plaintiff's claim is based directly on The City's misfeasance – its conscious failure to train its employees, amounting to deliberate indifference to Collins' physical safety and resulting in the deprivation of his substantive due process rights to life and liberty.

McClary is distinguishable on different grounds, which further illustrate the validity of Plaintiff's claim. In *McClary* the court stressed that the decedent had died as a result of "an accident neither the occurrence of which nor the particular victim of which could have been predicted. . . . " (786 F.2d at 87.) Here Plaintiff has alleged and will prove that, because of

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[2] The cases on which *Walker, Washington* and *McClary* rely are also not distinguishable on this issue. For example, in *Davidson v. Cannon*, 474 U.S. 344, 88 L.Ed.2d 677 (1986), the court rejected a prisoner's claim that he was assaulted by another prisoner because of the prison officials' *negligent* failure to protect him. (Citing *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662 (1986).)

In *Baker v. McCollan*, 443 U.S. 132, 61 L.Ed.2d 433 (1979), a man mistakenly identified as his brother was arrested and detained by the police. His Section 1983 challenge necessarily failed, for several reasons; first, he did not challenge the validity of the arrest warrant and therefore failed to establish a Fourth Amendment violation; second, he alleged only *negligence* on the part of the sheriff.

Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405 (1976), in which a convicted shoplifter brought an action against the city for publishing an allegedly defamatory flyer with his name on it, merely held that a person's interest in reputation alone, without a tangible interest such as employment, is insufficient to invoke the procedural protections of the due process clause.

past injuries to other, supervisory employees, also caused by The City's failure to train its employees, The City was fully conscious of the risk that additional employees, such as Collins, were at risk. The City could well have predicted and foreseen that additional untrained employees likely would be injured or killed in the sewer system.

Plaintiff's research has uncovered another relevant case, that The City has failed to cite. In *Rankin v. City of Wichita FAlls* [sic], Texas, 762 F.2d 444 (5th Cir. 1985), the Fifth Circuit held that plaintiffs did not state a cause of action under Section 1983 for the death of their son, based on the city's alleged gross negligence in operating the waste treatment plant where he had been employed. Though factually similar to this case, *Rankin* is fully distinguishable, in that plaintiffs alleged "gross negligence" only, and not conscious or deliberate indifference. Indeed, as the court in *Rankin* noted, "[t]he degree of negligence necessary to support a constitutional tort claim under section 1983 *has not yet been determined* by this court or the Supreme Court." (*Id.* at 447; emphasis supplied.) As discussed more fully below, the Supreme Court now has resolved the issue, with the standard of "failure to train amount[ing] to deliberate indifference." (*Canton v. Harris*, 103 L.Ed.2d at 426.) Plaintiff *has* alleged that The City acted with deliberate indifference in failing to train its employees.

Beyond these arguably narrow factual distinctions, a more fundamental and compelling reasons [sic] warrant disregarding *Walker, Washington, McClary* and *Rankin*. Simply put, they are wrongly decided.

These decisions err, first, in focusing on the employment relationship and in comparing public and private employment. The court in *Walker*, for example, observes that "[t]he Constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment[,]" and thus concludes that "the constitution is not a code of public safety." (791 F.2d 509, 508.) Similarly, the court in *McClary* concluded that "[w]e do not think that improper actions taken by employers violate an employee's substantive due process rights merely because

that employer is a governmental official." (786 F.2d at 89.) The *Rankin* decision also notes that the city "acted in this case in a role essentially indistinguishable from the role of a private employer. . . . " (762 F.2d at 449.)

This analysis is entirely misguided. The point is not to focus on the fact or nature of the employment relationship between the public entity and the injured or deceased worker, but on the identity of the defendant *as a governmental body*. What is significant is the abuse of governmental authority by public officials, manifest as deliberate indifference to the rights of *all* persons, whether employees or civilians. The fact that the victims in each of these cases happened to be an employee of the public entity simply should not divest them of their rights, under Section 1983, to redress the government's deprivation of their substantive due process rights.

The *Walker, Washington, McClary* and *Rankin* decisions also err in their baseless determination that public employees do not have a liberty interest in a safe work place, or in freedom from hazardous working conditions. As Judge Easterbrook acknowledged in *Walker*, public employment does afford certain constitutional protections:

> True, some portions of the constitution regulate the public employment relationship. For example, a public employee may not be fired for speech on matters of public concern, and he must be given an appropriate hearing before being fired if he has a 'property' interest in his job.

(791 F.2d at 510.)[3] Judge Easterbrook's gratuitous observation that "none of these particular rules is involved in this

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[3] Judge Easterbrook might have cited *Pickering v. Board of Education*, 391 U.S. 563 (1968) in support of a public employe's [sic] entitlement not to be fired for the exercise of his First Amendment rights, and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 449 (1985) and *Board of Education v. Roth*, 408 U.S. 504 (1972) for the proposition that a public employee may not be terminated without cause if he has a property interest in his job.

case" is mere dictum, at best. The fact that neither of the two particular examples identified by Judge Easterbrook was applicable in *Walker* hardly means that no other guarantees or entitlement might be implicated. Moreover, the *Walker* decision offers no authority for rejecting the claim that a public employee enjoys a life or liberty interest in freedom from unsafe working conditions.

In fact, as discussed more fully below, the State of Texas, by enactment of the Texas Hazard Communication Act, effective January 1, 1986, has recognized the right of public employees to be free from hazardous, unsafe working conditions. There is thus ample basis to conclude that public employees in Texas do have a substantive due process life and liberty interest in a safe work place. The City, by its conscious failure to train its employees pursuant to the Act, manifest its deliberate indifference to its employees' rights as guaranteed by the Act.

II. PLAINTIFF HAS STATED A CAUSE OF ACTION UNDER HARRIS FOR THE CITY'S DELIBERATE INDIFFERENCE IN FAILING TO TRAIN ITS EMPLOYEES

In *Canton v. Harris*, 489 U.S. ___, 103 L.Ed.2d 412, decided *after Walker, Washington, McClary* and *Rankin*, the United States Supreme Court held that the failure of a municipality adequately to train its police officers could give rise to a Section 1983 claim "where the failure to train amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact." (103 L.Ed 2d at 426.) The Court added that the "deliberate indifference" standard was most consistent with the requirement of *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611 (1978), that a municipality could not be held liable unless the constitutional violation is the result of a policy or custom. (103 L.Ed.2d at 427.) Further, the deficiency in the training program must be "closely related" to the ultimate injury. (*Id.* at 428.)

As the Supreme Court noted, this "deliberate indifference" standard had been recognized by a number of circuit

courts, including the Fifth Circuit. In *Languiraud v. Hayden*, 717 F. 2d 220 (5th Cir. 1983), the court in essence adopted a standard of "conscious indifference." (*Id.* at 227.)[4]

The *Harris* decision thus solidified and clarified the evolving recognition that municipalities may be held liable for failure to train public employees, if conscious or deliberate indifference is established, and where the incident in question is not an isolated one.

Moreover, the *Harris* "deliberate indifference" standard for "failure to train" cases alleviates the concern expressed in *Walker, Washington* and *McClary* that in such cases Section 1983 might be reduced to a general tort statute. By permitting Plaintiff here to assert that The City deprived Collins of his substantive due process liberty interest in a safe work place, as well as his right to life itself, by its deliberate indifference in failing to train its employees, this Court will be imposing a standard or care far more limiting than that of mere gross negligence.

Under this standard, Plaintiff has stated a cause of action under section 1983. Plaintiff properly has pled, and the evidence will show, that The City failed adequately to train its employees in relevant work safety measures, as provided by

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[4] The Fifth Circuit in *Languiraud* concluded as follows:

> We conclude that if there is a cause of action under section 1983 for failure to properly train a police officer whose negligence or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

(717 F.2d at 227-228.)

state statute; that such failure amounted to deliberate indifference, particularly in view of the known and repeated work place injuries; and that such deliberate indifference directly caused the deprivation of Collins' constitutional rights not to be deprived of life or liberty.

This Court can and should reject *Walker*, *Washington* and *McClary* and be guided by the United States Supreme Court's decision in *Harris*, which is directly on point and controlling, mandating denial of The City's motion to dismiss.

III. THE CITY'S DENIAL OF COLLINS' RIGHTS AS GUARANTEED BY STATE STATUTE AMOUNTS TO A DENIAL OF DUE PROCESS AND THEREBY GIVES RISE TO A CAUSE OF ACTION UNDER SECTION 1983

As alleged more fully in Plaintiff's Original Complaint, the Texas Hazard Communication Act, effective January 1, 1986, guarantees all employees, including "persons working for the State of Texas and its political subdivisions" (Section 3(6)), specific, substantive and procedural rights designed to ensure safety in the work place. Section 15(a) provides, in pertinent, as follows:

> [E]mployees *shall* receive training on the hazards of the chemicals [to which they are exposed] and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act.

(Emphasis supplied.)

This state statute thus creates affirmative rights for all employees in the State of Texas, including municipal employees such as Collins, amounting to a liberty interest in a work place free of the very hazards to which Collins succumbed. The Fourteenth Amendment protects against the deprivation of such rights without due process of law.

It is well established the deprivation of a liberty interest created by state statute constitutes a violation of the due process clause of the Fourteenth Amendment, which may be redressed under Section 1983. (See, e.g., *Board of Pardons v.*

Allen, 482 U.S. 369, 96 S.Ct. 303 (1987) [state law stating that parole "shall" be granted under certain conditions creates liberty interest]; *Mills v. Rogers*, 457 U.S. 291, 73 L.Ed.2d 16 (1982) [mental patients' state statutory right to refuse anti-psychotic drugs]; and *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28 (1982) [conditions of confinement of mental patients].)

Plaintiff here thus has stated a cause of action against The City under Section 1983 for its conscious failure to train its sanitation employees pursuant to the Act, which failure amounted to deliberate indifference and resulted in the deprivation of Collins' state-guaranteed liberty interest in safe working conditions, in violation of the Due Process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should deny The City's motion to dismiss and allow Plaintiff to proceed on her Section 1983 action against The City.

DATED: Oct. 30, 1989

Respectfully submitted,

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By: /s/ Don Busby
Don Busby
State Bar #03490000

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS, Plaintiff	X	CIVIL NO. W 89-CA-168
VS.	X	FILED NOV 16 1989
THE CITY OF HARKER HEIGHTS, TEXAS	X	

NOTICE OF APPEAL

Notice is hereby given that MYRA JO COLLINS, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment granting the Defendant's Motion to Dismiss entered in this action on the 31st day of October, 1989.

Respectfully submitted this 15th day of November, 1989.

/s/ Don Busby
Don Busby
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State Bar #03490000
Attorney for Plaintiff

NOTICE OF APPEAL

Myra Jo Collins,
Plaintiff-Appellant,
v.
The City of Harker Heights, Texas,
Defendant-Appellee.
No. 89-8029.

United States Court of Appeals,
Fifth Circuit
Nov. 2, 1990.

Widow of city sewer worker, who entered manhole to clear line and died of asphyxia before he could be removed, brought civil rights suit against city. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed for failure to state claim, and widow appealed. The Court of Appeals, Barksdale, Circuit Judge, held that city sewer worker did not die as a result of any abuse of government power, and thus, widow could not maintain § 1983 action against city.

Affirmed.

1. Civil Rights

City sewer worker, who was instructed to enter manhole to clear a line and who died of asphyxia before he could be removed, did not die as a result of any abuse of government power and, thus, widow of worker could not maintain § 1983 action against city. 42 U.S.C.A. § 1983.

2. Civil Rights

Mere negligence is insufficient to establish municipal liability under § 1983. 42 U.S.C.A. § 1983.

3. Civil Rights

In suit against municipality, as employer, under § 1983 for alleged failure to train employee, showing of direct causal link between municipal policy or custom and alleged constitutional

deprivation is not sufficient in itself; a separate standard of "abuse of government power" must also be satisfied. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, DAVIS, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

Myra Jo Collins appeals the Fed.R.Civ.P. 12(b)(6) dismissal of her § 1983 action, which alleges that the failure of the City of Harker Heights, Texas, to adequately train its employees was a policy of deliberate indifference to her deceased husband's constitutional rights. Pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action does not lie. Accordingly, we AFFIRM.

I.

According to Collins' complaint, her husband began working in July 1988, for the City in its sanitation and sewer department, including entering sewer mains through manholes when there was a sewer line problem. In October 1988, as instructed, he entered a manhole to clear a line and died of asphyxia before he could be removed.

Collins alleged that: her husband's death was caused by the City's policy of not providing safety training to its employees; there was a custom for safety equipment to either not be taken to, or used at, the job site; no warnings or instructions were given on the hazards in entering sewer lines or how to protect against them; several months before her husband's death, his supervisor entered a manhole and was rendered unconscious, placing the City on notice of the risks in sending its employees into the lines; the City systematically and intentionally failed to provide the equipment, training or instruction required by the Texas Hazard Communications Act; and, *inter alia*, this pattern of behavior by the City was

a custom and policy of deliberate indifference to the Fifth and Fourteenth Amendment rights of its employees.[1]

The district court granted a Rule 12(b)(6) dismissal, expressly taking into consideration the applicable causation standard ("deliberate indifference to constitutional rights") set by *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 57 L.Ed. 1232 (1989), but noting that an "abuse of governmental power" was lacking, stating first:

> The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. In this case the deceased was not in the custody of the [City], he was an employee.

(Citations omitted.) It next ruled that a municipality's improper action against its employee does not constitute *ipso facto* deprivation of a constitutional right; and held that because a constitutional right had not been violated, an action under § 1983 could not lie.

II.

The question presented in this case is whether a plaintiff seeking recovery under § 1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a § 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard. The district court appears to have merged those two standards, which are among those necessary for bringing § 1983

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[1] Collins also pleaded state law claims.

into play here. In reviewing this Rule 12(b)(6) dismissal, we will keep them separate.[2]

Section 1983 provides in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, . . . secured by the Constitutional and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983. In *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a § 1983 action could lie against a municipality only where it "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or where "constitutional deprivations [occurred] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91, 98 S.Ct. at 2035-36.

Earlier, in *Paul v. Davis*, 424 U.S. 693 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court rejected the idea that "the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." *Id.* at 699, 96 S.Ct. at 1159. Furthermore, mere negligence is insufficient to establish municipal liability under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986).

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[2] Of course, in reviewing the dismissal we must accept as true all well-pleaded averments and view them in the light most favorable to the plaintiff; "[w]e may uphold . . . [Rule 12(b)(6) dismissal] only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Baton Rouge Bldg. and Constr. Trades Council v. Jacobs Construction, Inc.*, 804 F.2d 879, 881 (5th Cir.1986); *see also Rankin v. City of Wichita Falls*, 762 F.2d 444, 446 (5th Cir.1985).

As stated fairly recently by the Supreme Court in the above-cited *City of Canton, Ohio v. Harris*, the "first inquiry in any case alleging municipal liability under § 1983 is . . . whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." 109 S.Ct. at 1203. *City of Canton* concerned a § 1983 action for violation of an alleged Fourteenth Amendment right to receive proper medical attention while in post-arrest police custody, arising in part out of inadquate training of the custodial police officers concerning when to summon medical care for a detainee. For such failure to train cases, the Supreme Court noted there was "substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted" and held that "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 1204 (emphasis by Court).

City of Canton does not permit all municipal failure to train actions to lie under § 1983, as is reflected by the court's restatement of its holding:

> Consequently, while claims such as [the detainee's]—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

Id. at 1206. *City of Canton* arises out of the use, or abuse, of government power; the holding springs from a citizen being held in custody after arrest, without the ability to control or choose a necessary course of action and being dependent upon the government to do so. The holding establishes only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. In this Circuit, there is a separate standard that must also be satisfied—an abuse of government power. While this element is in many ways similar to, and often blends with, other necessary

elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.

Keeping the standards in mind, we turn to Collins' complaint, in which she makes the requisite *Monell* and *City of Canton* allegations, charging that the City's "custom and policy of deliberate indifference towards the safety of its employees" violated the constitutional rights of her deceased husband. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City—one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a § 1983 action—whether there was a deprivation of a constitutional right.[3]

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[3] For such deprivation, the complaint alleges that the decedent "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City['s] . . . custom and policy of deliberate indifference toward the safety of its employees"; that the obvious need for proper training and use of safety equipment, especially as mandated by the Texas Hazard Communication Act, Tex. Health & Safety Code Ann. § 502.001 et seq. (Vernon 1990), and the concomitant failure to do so, "result[ed] in the violation of an employee's constitutional rights—the right to be free from harm and injury resulting in death." In her initial brief, Collins contends, for example, that "a public employee enjoys a life or liberty interest in freedom from unsafe working conditions"; that the Texas Hazard Communication Act, by "confer[ring] on public as well as private employees the right to be free from hazardous, unsafe working conditions," has "create[d] affirmative rights for all employees in the State of Texas, including municipal employees, . . . a liberty interest in a work place free of the very hazards to which the decedent succumbed"; that "[i]t is well-established that deprivation of a liberty interest created by state statute constitutes a violation of the due process clause of the Fourteenth Amendment, which may be redressed under Section 1983"; and that therefore, "[p]ublic employees in the State of Texas. . . . have a substantive due process liberty interest in a safe workplace." *See, e.g., DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 1003 n. 2, 103 L.Ed.2d 249 (1989) (issue raised but not considered). At oral argument, Collins' counsel stated that this right to a safe workplace was the equivalent of a substantive due process right to life. Because we do not reach this issue, we express no opinion on it.

Collins contends that pursuant to *City of Canton*, her claim is sufficient to withstand Rule 12(b)(6) dismissal. But, as discussed above, Collins reads too much into *City of Canton*. It pertained to cases concerning use of governmental power on the governed, to government qua government, consistent with the reminder in *Daniels* that

> [o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states,' " *Paul v. Davis*, 424 U.S. 693, 701 [96 S.Ct. 1155, 1160, 47 L.Ed.2d 405] (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527], at 544 [101 S.Ct. 1908, 1917, 68 L.Ed.2d 420].

474 U.S. at 332, 106 S.Ct. at 665. Collins has received payments pursuant to the worker's compensation law of Texas;[4] and we express no opinion whether she might have a cause of action under state law.[5] In any event, and as held repeatedly in controlling precedent in this Circuit, she does not have a § 1983 claim against the City. Such precedent is found, for example, in *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir.1985); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir.1987); and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989) (rendered after *City of Canton* and *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)).

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[4] Needless to say, the receipt of such payments, evidenced, for example, by an affidavit filed with the City's Rule 12 motion, has no bearing on whether under Rule 12(b)(6), a § 1983 action can lie in this instance.

[5] The dismissal included her pendent state law claims.

In *Rankin*, a situation tragically similar to the case at hand, a municipal water treatment plant employee drowned while attempting to save another who had fallen into one of the tanks. The action against the city charged that work site safety defects constituted a municipal custom and practice which caused a deprivation of a constitutional right. This court affirmed the dismissal of the complaint for failing to state a claim under § 1983. Because the case predated *City of Canton's* fixing the causation standard, the court assumed that the complaint sufficiently alleged conduct to meet "whatever standard . . . is necessary to state a constitutional claim under section 1983." 762 F.2d at 447.

However, the court explained that simply alleging, or meeting, a causation standard for cases such as this is not enough to permit an action under § 1983.

> While some degree of government 'fault' is necessary to state a claim under the Constitution, to predicate liability under section 1983 totally on the mere degree of fault would be to convert the due-process clause into an ordinary tort statute and to lose sight of the fact that section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of state law.

Id. at 447-448. Accordingly, the court found possible § 1983 liability wanting, "because the existence of the alleged work place defects . . . did not amount to a misuse of government power. . . ." *Id.* at 449. The court further explained this controlling distinction:

> The City acted in this case in a role essentially indistinguishable from the role of a private employer; accordingly, we cannot view the City's failure to redress the patent but possibly severe defects in [the decedent's] workplace as an abuse of government power. [The decedent's] association with the treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been. This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state, nor are state representatives alleged to have violated the special obligation

> of government to refrain from intentional violations of constitutional rights.

Id. at 449. The court held that "the plaintiffs have made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*"; that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law." *Id.* at 447, 449 (emphasis added).[6]

In *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987), also rendered before *City of Canton*, a police officer alleged that city policies allowed a prisoner to seize another officer's gun and shoot the plaintiff officer; that these policies "manifest[ed] deliberate indifference to or conscious disregard" for his safety. This court affirmed the Rule 12(b)(6) dismissal by applying the *Rankin* holding that the complaint failed to allege the requisite abuse of government power.

And, in *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989), decided after *City of Canton*, this court applied the *Rankin* analysis to a § 1983 claim by jail detention officers, injured by inmates during an attempted escape. In doing so, it also applied similar decisions from other Circuits and the then recent decision by the Supreme Court in *DeShaney*, handed down only six days before *City of Canton*. *DeShaney* involved a § 1983 action against a governmental entity and its employees (the government) for child abuse injuries; it was alleged that the government's failure to protect the child from his custodial father constituted a Fourteenth Amendment substantive due process violation. Although, obviously, *DeShaney* did not involve the employment relationship in issue here, it is applicable because it holds that not all injuries arising out of an association or relation-

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[6] In addition to relying on *City of Canton*, Collins attempts to distinguish *Rankin* because it did not address whether the regulations allegedly violated by the municipality created a constitutional right. As discussed earlier, including in note 3, this argument does not concern the controlling issue in this case, abuse of government power; it concerns a separate issue or standard—deprivation of a constitutional right—that we do not reach.

ship with the government give rise to a § 1983 claim, even if all other elements for that claim are present.

One contention in *DeShaney* was that because the government was aware of the danger to the child and took some action to protect him, it acquired a duty to do so in a proper manner, and the failure to do so was an abuse of governmental power that constituted a substantive due process violation. In rejecting the contention, the Court noted it was "true that in certain limited circumstances the Constitution imposed upon the [government] affirmative duties of care and protection with respect to particular individuals," but this arose only

> when the [government] takes a person into its custody and holds him there against his will, [it is then that] the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the [government] by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause . . . In the substantive due process analysis, it is the [government's] affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1004-1006 (citations omitted).

Accordingly, this court stated in *Benavides* that *DeShaney* "confirm[ed] the rationale of several of our similar recent cases," including *Rankin* and *Hogan*. 883 F.2d at 387. Based upon the facts in *Benavides*, this court noted that

> prison guards are employees who "enlisted, on terms they found satisfactory, and [who] were free to quit whenever

> they pleased." *Washington [v. District of Columbia]*, 802 F.2d [1478, 1482 (D.C. Cir.1986)]; *Walker [v. Rowe,]* 791 F.2d [507, 511 (7th Cir.), *cert. denied*, 479 U.S. 994 [107 S.Ct. 597, 93 L.Ed.2d 597] (1986)]. We applied the same rationale in *Rankin* when we noted that the plaintiffs' decedent's "association with the [defendant city's] treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been."

883 F.2d at 388.

Collins contends that the determinative factor making this a proper post-*City of Canton* § 1983 action is simply that the defendant is "*a governmental body*" (emphasis by Collins); that we should "not . . . focus on the relationship between the public entity and the injured or deceased person"; that the alleged deliberate indifference, without more, constitutes the necessary "abuse of governmental authority"; and that the strict, or high, causation standard fixed by *City of Canton* removes the concerns that lead to establishing the abuse of government power standard. As part of, or alternative to, her contention that the abuse of government power standard employed by *Rankin* and other cases was replaced, or subsumed, by the *City of Canton* causation standard, Collins asserts that even if an abuse of government power must be alleged, she has done so sufficiently for Rule 12(b)(6) purposes, relying, in part, on the recent Eighth Circuit holding in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir.1989).[7]

In *Ruge*, the § 1983 action alleged that the City had a deliberate policy of not shoring ditches and required employees to work in them without warning of such danger. For Rule 12(b)(6) – dismissal, the city urged the court to apply the reasoning from

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[7] Although Collins did not expressly plead an abuse of government power, or plead to the effect that the City's conduct was of a unique governmental character, we find for purposes of our discussion and in light of our standard of review for Rule 12(b)(6) dismissals that this necessary element for a § 1983 action of this type was pleaded sufficiently. But, the controlling and distinguishing factor is that even assuming abuse of government power was pleaded by implication, it cannot be present under any allegation in this action.

Rankin and *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir.1986), "that in an employer-employee relationship where the plaintiff fails to show the state conduct complained of was of a 'uniquely governmental character' there is no abuse of government authority and thus no improper state action." 892 F.2d at 741.

The *Ruge* court, however, distinguished *McClary*, ruling that *McClary* held instead that the death "was not caused by any established state procedure and therefore did not constitute a constitutional deprivation."[8] *Id.* The *Ruge* court discussed, but did not attempt to distinguish, *Rankin*.

Ruge reversed the Rule 12(b)(6) dismissal, holding that "an abuse of government authority arises sufficient to state a cause of action under section 1983," when a death, including of a municipal employee, is caused by an inadequate municipal policy, adopted with the requisite culpability." *Id.* at 741 n. 6. In so holding, the court stated:

> However, where the state simply commits a tort, there is no misuse of government power when "the event, however tragic, was an accident neither the occurrence of which nor the particular victim of which could have been predicted." *McClary*, 786 F.2d at 87. We deem a policy, if adopted and proven, that would show a city *actively pursued* conduct which was deliberately indifferent to the constitutional rights

[8] Without expressing an opinion on the *McClary* holding, we do note that the *McClary* court stated:

> Although we hold that reckless acts of a government employer that harm employees do not give rise to a substantive due process violation as long as the challenged conduct is not *uniquely governmental in character*, we by no means intend to exclude grossly negligent, reckless, or intentional abuses of *governmental* authority from the purview of section 1983. (Citations omitted). Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under § 1983.

786 F.2d at 89 n. 6 (emphasis added).

> of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act. *See City of Canton*, 109 S.Ct. at 1204.

Id. at 742 (emphasis added).

We are unable to find sufficient shades of difference with the *Ruge* holding to allow us to not find it in conflict with our controlling precedent.[9] *Ruge* might compel finding here that the alleged municipal policy is an abuse of government authority or, stated differently, conduct that was of a "uniquely government character," sufficient to preclude Rule 12(b)(6) dismissal. We respectfully disagree. Furthermore, we are bound by our controlling Fifth Circuit precedent. As demonstrated, it has not been changed by a Supreme Court decision; in fact it is solidified by that Court's decisions.[10]

There was no abuse of government power. This is not an instance "when the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney*, 109 S.Ct. at 1005. It is "not a case in which a government official, because of his unique position as such, was able to impose a loss on an individual." *McClary*, 786 F.2d at 89. Nor was there "a misuse of power made possible only because the City [was] clothed with authority of state law." 762 F.2d at 449. Accordingly, this action cannot lie under § 1983.

III.

The judgment of the district court is AFFIRMED.

[9] As emphasized in the passage quoted above, one difference might be its seeming to include the requirement that the city "actively pursue" deliberately indifferent conduct. 892 F.2d at 742.

[10] Because our holding is mandated by controlling Fifth Circuit precedent, and because *Ruge* not this court, created an inter-circuit conflict, we have not sought en banc consideration by this court prior to rendering this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-8029

FILED NOV 02 1990
D.C. Docket No.W 89 CA 168

MYRA JO COLLINS,

Plaintiff-Appellant,

versus

THE CITY OF HARKER HEIGHTS
TEXAS,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas

Before WISDOM, DAVIS and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the cost on appeal to be taxed by the Clerk of this Court.

November 2, 1990

ISSUED AS MANDATE NOV 26 1990